U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 18 November 2002

CASE NO.: 2001-LHC-1648

OWCP NO.: 8-116048

IN THE MATTER OF

JERRY HALEY
Claimant

v.

TEXAS DRYDOCK, INC.
Employer

and

RELIANCE NATIONAL INDEMNITY CO.
Carrier

APPEARANCES:

Quentin Price, Esq. and
Ed Barton, Esq.
For Claimant

Jeremy Stone, Esq. and
Dennis Sullivan, Esq.
For Employer/Carrier and TPCIGA

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers'

Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Jerry Haley (Claimant) against Texas Drydock, Inc.[1] (Employer) and Reliance Insurance Company (Carrier). The formal hearing was conducted at Orange, Texas on May 22, 2002. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[2] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-44, 46-49, Employer's Exhibits 1-38, and Solicitor's Exhibit 1. This decision is based on the entire record.[3]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on October 13, 1998 as to the wrist injury; disputed as to neck;
2. The injury/accident was in the course and scope of employment; disputed as to neck;
3. An employer/employee relationship existed at the time of the injury/accident; disputed as to neck;
4. Employer was advised of the injury/accident on October 13, 1998; disputed as to neck;
5. A Notice of Controversion was filed March 22, 1999;
6. Department of Labor made recommendations without an informal conference;
7. The average weekly wage at the time of injury was $ 662.05;
8. Temporary total disability and temporary partial disability are disputed;

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[1] Formerly known as TDI Halter

[2]The parties were granted time post hearing to file briefs. This time was extended up to and through August 30, 2002.

[3] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __, lines __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; Claimant's Exhibit- "CX __, pg.__"; and Solicitor's Exhibit- "SX___, pg.___".

9. Employer paid Claimant benefits including temporary total disability from February 19, 1999 to December 1, 2000, Total benefits paid were $20,299.39;
10. Date of maximum medical improvement for the wrist injury was July 21, 1999; and
11. There is a 4% permanent impairment for the wrist injury. There remains a dispute as to whether it is a permanent impairment of the hand or arm.

Issues

The unresolved issues in this proceeding are:

1. Cause, Nature, and Extent of Neck injury
2. Section 7 Medical treatment for wrist and neck
3. Course and Scope of Neck Injury
4. Penalties, Interest, and Attorney's Fees

Statement of the Evidence

Testimonial and Non-Medical Evidence

Claimant, age 49, graduated from high school in West Orange, Texas in 1972. Mr. Haley is the father of four children and works as a deputy sheriff in Bandera County, Texas. He was working for TDI Halter as an electrician at the time of his accident on October 13, 1998.

Claimant testified that he began working for TDI Halter on September 22, 1998. He was hired as a maintenance electrician at the Orange Yard on Front Street, and was responsible for all the electrical work, including the shops, vessels, and temporary lighting for individuals repairing the vessels. At times, Claimant testified, he even brought in substation power and worked on cranes, and overheads, as well as any other electrical needs of the company. Claimant was paid $13.20 an hour when he was originally hired, but he received a 50 cent raise in January 1999, bringing his hourly wage to $13.70.

In the formal hearing Claimant testified that on October 13, 1998, he and a helper were attempting to connect power to an automatic painting machine in one of

the fabrication shops. Claimant was in a man-lift and his helper was on the ground. The man-lift was approximately three feet by four feet and surrounded by rails. While attempting to maneuver in and around the conduit, Claimant needed to go up and around some beams. He released the control by reaching over the control panel. According to Claimant, the man-lift lunged unexpectedly upward and caught Claimant's left wrist between the bar on the top of the control box and an overhead crane track. Claimant testified that the sudden lunge of the man-lift caused him to fall into the basket. He explained that he was hanging by his wrist as his weight was off the bottom of the basket. Nobody on the ground was able to operate the controls, and Claimant had to pull himself back up and reach around to grab the controls to reposition the basket and remove his wrist. When he was able to get the basket to the ground, Rocky Lyons, the on-site safety inspector, took Claimant to Tower Medical Center. Claimant described his wrist as crushed from both sides, black and blue and only about half inch in thickness. At Tower Medical Center, he had x-rays, was given a splint, and returned to full duty. The hospital personnel focused specifically on the wrist injury, and no orthopedic evaluation was performed.

Claimant testified that when returned to work he was essentially placed on light duty. He testified that Rocky Lyons agreed to assign him to regular duty, however, he would not have to use his hand, but at the same time would not have reduced light duty hours. During the time that Claimant continued to work for TDI in his light duty position, he was undergoing medical treatment with Dr. Figari, including the Carpal Tunnel Release Surgery on November 16, 1998. Claimant's wage records reflect that he lost no wages during this time. Claimant was eventually terminated on February 19, 1999 as part of a reduction in the general work force.

Following his lay off, Claimant placed himself under the care of Dr. Masson, a hand specialist, beginning March 1, 1999. Dr. Masson restricted Claimant from work until significant function returned to his hand. Claimant returned to Dr. Masson in June 1999, when he recommended four weeks of therapy followed by four weeks of work hardening. When Claimant went back to Dr. Masson a month later he complained that during a work hardening session a week earlier he had experienced some acute pain down his neck and arm.

On July 21, 1999, shortly after Claimant began experiencing renewed arm

and shoulder pain, Dr. Masson felt he had reached Maximum Medical Improvement for his wrist, and returned Claimant to Dr. Figari for further treatment of his neck. Dr. Masson restricted Claimant from work until the neck pathology could be cleared up. Several months later Claimant began working as a truck driver. However, he noted that although he found work, he was never without pain in his shoulder, hand or arm, and he continued to take pain medication that had been prescribed for a previous lower back injury. Thereafter, Claimant saw several other physicians and ultimately underwent cervical surgery for a two level fusion on July 3, 2001, performed by Dr. Hilton.

Beginning on September 13, 1999, Claimant testified that he worked as a truck driver for Braundera Hardware and Lumber, in San Antonio, Texas, driving a dump bed delivery truck.(EX 30) The company's owner was aware of Claimant's neck and wrist pain, and so he allowed Claimant to avoid much of the loading and unloading, most of the lifting was done by the forklift. Claimant quit to find a higher paying job, as he was planning to get remarried. While at Braundera his total wages earned were $9, 659.00.[4]

After quitting Braundera Hardware Claimant was employed driving an 18-wheeler for Alamo Forest Products. He worked for Alamo until he quit, on an unspecified date, citing physical difficulties loading and unloading his truck. He earned $6, 880.81 while at Alamo.

After leaving work at Alamo, Claimant decided to go back to night school and try to get his police officer's license while working security. Claimant testified that he worked for various employers during this period, including Fort Bend Patrol, Admiral Security, and finally Wackenhut Airline Services. Claimant earned $345.00 at Fort Bend, and $ 168.00 at Admiral Security (EX 29). Claimant began to work for Wackenhut Security on October 4, 2000, where he was employed until January 14, 2001. He worked a total of 15 weeks and earned $3,310.42. Claimant left his position at Wackenhut to join the Sheriff's Department.

Claimant was hired permanently as a deputy sheriff with the Bandero County Sheriff's Department, on January 21, 2001. In 2001, Claimant earned a total of

[4] EX 29 p. 68. As explained at the formal hearing, the correct dates worked at Bandero Yard and Hardware, Inc. are 9/13/99-2000 not 2000-2001.

$17, 606, and from January 1, 2002 until May 15, 2002, Claimant earned $8,318.73.

Mr Quintanilla, whose report is Employer's Exhibit 13, is a vocational rehabilitation expert. He agreed that Claimant's job as a Sheriff's deputy is appropriate for his functional capacity, and based on the fact that he had been employed for over a year, it accurately demonstrated his earning capacity. Mr. Quintanilla stated that Claimant's weekly wage earning capacity was $502.03, based on two weeks of earnings at $1104.07.

Claimant's co-workers, Bill Hardy and Rocky Lyons, testified by way of depositions. Mr. Hardy's deposition is Employer's Exhibit 31. Mr. Hardy has been an employee of TDI-Halter for 11 years, and safety manager since 1992. Although Mr. Hardy testified that he did not remember the accident itself, he did remember that it had occurred, and he was responsible for reviewing the accident report and signing it. Mr. Hardy stated that his knowledge is limited to the information contained in the report. Mr. Hardy agreed with Claimant's counsel that often all the attention goes to the major or most obvious injury.

Rocky Lyons, whose deposition is Employer's Exhibit 32, worked at TDI-Halter for 4½ years as a site safety inspector. Before TDI Halter, Mr. Lyons had worked at Southeast Texas Industries, for 8 months, and Pneumatic Engineering, Inc. for 3½ months. Mr. Lyons testified that he and Mr. Haley were co-workers as well as friends, socializing together outside of work. Mr. Lyons testified that he had never heard that Claimant had any problems stemming from the accident beyond those of his wrist. However, later in his deposition he also remarked that based on his experience with other personnel, it was possible that later problems had arisen but had never been mentioned in formal reports.

Medical Evidence

Immediately following the injury, Claimant was taken to Tower Medical Center, where a doctor performed x-rays, but found nothing of note. The medical records from Tower Medical Center are Employer's Exhibit 4. Although the doctors found no fractures, due to the nature of his injury the doctor recommended returning in three to five days, to see if anything that had not been initially apparent had emerged. Claimant received medication for the pain, and had the injured wrist placed in a sling or splint, with instructions to return. At the follow-up visit to

Tower Medical Center, Claimant was informed that no bones were broken, and was referred to Dr. Figari. When Claimant complained of pain in his back and arm, the doctor explained that it was the pain from his wrist traveling to his arm and shoulder.

Dr. Shawn Figari, whose medical records are Employer's Exhibit 5 and deposition is Employer's Exhibit 36, first saw Claimant on October 26, 1998. Dr. Figari is a board certified orthopedic surgeon. Initially, Dr. Figari arranged for Claimant to have a bone scan and EMG with Dr. Jones, to evaluate the Median nerve. The tests focused on Claimant's elbow and below, which Claimant testified was the main reason for his visit. The tests showed a compression neuropathy at the carpal tunnel. As a result of Dr. Jones' testing, Dr. Figari scheduled Claimant for a carpal tunnel release surgery on his left wrist, which ultimately did little to alleviate the pain. During the surgery, Dr. Figari observed scar tissue in the area of the transverse carpal ligament, however, he felt that the nerve was intact.

After the surgery of November 16, 1998, Claimant continued to have stinging and numbness in his thumb, index finger and part of his middle finger, as well as the sensation of cramping whether his hand was opened or closed. Claimant testified that the pain was intense, radiating to the back of his forearm through to his shoulder. On November 25, 1998, Claimant's splint was removed, and five days later the sutures were taken out.

On December 16, 1998, Dr. Figari released Claimant to regular work. To avoid loss of hours, however, both the doctor and Claimant testified that there was an understanding that he would be unofficially placed on light duty work. On that same visit, Claimant complained that when he lifted his arm there was pain shooting through his arm down to his fingers. Dr. Figari explained in his deposition that Median nerve damage could cause pain when raising the arm above the head.

The pain persisted, and in the following months, Dr. Figari ordered a nerve conduction study for below the elbow, which indicated that the nerve had been damaged so significantly that it would have to reinnervate itself. By February 10, 1999, Dr. Figari was concerned that the Median nerve might require some sort of grafting, since there had been such little improvement over the length of time since the injury. Dr. Figari felt that the Median nerve injury was serious enough that Claimant should see someone who did hand surgery, and so he referred Claimant to

Dr. Masson.

Dr. Marcos Masson, whose medical records are Employer's Exhibit 6 and deposition is Employer's Exhibit 33, is a hand specialist in Houston, Texas, who is board certified in orthopedic upper extremities. He is the Director of Hand and Upper Extremities at Hermann Hospital and is licensed by the State of Texas to practice medicine. When Dr. Masson first met with Claimant on March 1, 1999, he anticipated treating Claimant's wrist and hand problems. Claimant then explained that he experienced pain through his arm and shoulder. Dr. Masson gave the same explanation Mr. Haley had received previously, pain travels. Dr. Masson explained to Claimant that the maturation of the tissue injury caused the complained of pain, and prescribed desensitization, anti-inflammatories, and other medications, anticipating that Claimant would reach MMI in three months. In the interim, Dr. Masson restricted Claimant from working. (CX 39, p.2)

On June 14, 1999 Dr. Masson explained that significant improvement in nerve irritation takes time, however the pain Claimant described was more focused and pointed, which was an indication of improvement. Claimant testified that Dr. Masson did not understand what was causing the problem in his fingers, and recommended trying to get sensation to return to the nerves by holding cups of hot coffee and cold ice. Dr. Masson recommended four weeks of therapy followed by work hardening program. He scheduled a follow-up appointment in a month.

In June and July 1999, the physical therapy that Dr. Masson prescribed included some water aerobics which was an effort to get muscle tone back in the unused arm. Claimant also performed some grip exercises and some pushing and pulling to strengthen the left arm. Claimant had been able to grasp items using his little finger and ring finger combined with the palm to grip things, but had avoided using his left hand. When Claimant complained of pain in his left arm to the physical therapist, she explained that the pain came from lack of use. At a later session, Claimant began having a lot of pain throughout his chest and shoulder down through his left arm. The pain was so intense that he could not lift his left arm. After checking his blood pressure the physical therapist called an ambulance and sent Claimant to the Emergency Room, thinking he was having a heart attack.

Claimant was admitted to the St Elizabeth Hospital July 7, 1999, medical records are Claimant's Exhibit 34. After performing a stress test for his heart,

which he failed, hospital personnel put Claimant on a nitroglycerin drip. However, upon discharging the Claimant, the doctors determined that it had not been a heart attack. Dr. Scott Sherron restricted lifting to 5 lbs and prohibited driving for 3 days. Dr. Masson later opined that the pain could be symptomatic of a neck injury, and so he ordered an MRI.

On July 12, 1999 Dr. Masson treated Claimant with injections to the wrist, side of his hand, and side of his palm, in an effort to deal with the pain surrounding the scar. Claimant mentioned the pain in his shoulder and neck. He also told Dr. Masson that he had been worked up for heart problems and had episodes of left shoulder pain.

On July 21, 1999 in a scheduled follow-up appointment, Claimant complained to Dr. Masson of pain in his left shoulder, neck and arm, although his hand had improved. Dr. Masson testified in his deposition that the history of the shoulder pains and the heart work up at that time would indicate that there might be some other source of the pain. Dr. Masson recorded that Claimant was unable to bend his neck without significant pain, as well as decreased sensation in the C5 and C6 dermatones. Based on the x-rays, he thought that Claimant had a radiculopathy, however, it was difficult to tell from the spinal bony stenosis versus a disk. When Claimant's complaints of neck pain persisted, Dr. Masson referred him back to Dr. Figari, explaining that he was only prepared to treat Claimant's wrist and hand. Dr. Masson also noted that he would return Claimant to full-duty status when his neck pathology was cleared up.

Claimant was referred back to Dr. Figari, who ordered the MRI, which indicated two herniated discs that were applying pressure to a nerve in Claimant's neck. In Employer's Exhibit 36 p23-25, Dr. Figari testified that he felt that neck treatment was needed, and referred Claimant to Dr. Mims in Houston.[5]

Dr. Masson was questioned extensively on the causal connection between the neck injury and the back injury. He felt that the work hardening had unmasked some irritation at the level of the neck. However, he opined that the neck injury was not related to the original accident, because if Claimant had no complaints in the preceding nine months, and it was a recent onset, then he would have a hard time

[5] Claimant had a previous back surgery with Dr. Mims, and requested that Dr. Figari refer him to Dr. Mims.

believing it was related to the original injury. Dr. Masson went on to explain, however, that there may have been an indirect connection, in that the biomechanics of the body had changed because of the weakened wrist, resulting in a heavier reliance on the arm and shoulder further aggravating his pre-existing back injuries. The work hardening program at St Elizabeth's might have been the aggravating event for a pre-existing injury, meaning Claimant could have herniated a disc on October 13, 1998 that caused a nerve root impingement, but it was only noted when he began work hardening activities. If Claimant had mentioned the pain more prolifically, Dr. Masson felt he could comment more definitively.

Dr. Masson also explained a phenomenon in which it is very common for patients to have an injury of an extremity distally and have a pulling reaction which then would indirectly cause a neck or back injury. Dr. Masson remarked that the only way to create a causal link is through the historical analysis of subjective complaints. However, since a disc protrusion may not be immediately painful, there remains a possibility that it could be related to the traumatic injury, and went unmentioned due to the more severe wrist injury.

Dr. Masson also testified that a C6 radiculopathy is indistinguishable from a Median nerve injury, because the pain an individual feels in his thumb and his index finger is remarkably comparable. However, Dr. Masson stated that even with the understandable focus on the crushing wrist injury, if there had been prior reports of pain there might be better weight regarding the association of the two events. In sum, reviewing the medical documents lead Dr. Masson to say that the neck injury was not related to the October accident.

Dr. Figari saw Claimant again on August 2, 1999, to address his complaints of neck pain and evaluate the MRI taken July 9, 1999 (EX 36). He opined that the neck injury that he observed was something that had been acquired over time, but the disc extrusion may have happened during the traumatic injury of October 13, 1998, however, there was no way to tell exactly when it occurred. He also remarked that this type of neck injury would typically cause the patient to complain right away, but if associated with another injury then possibly it would go unnoticed for a period of time. Dr. Figari agreed that although the symptoms associated with the neck and back injury were serious, pain is relative, and they may not be as acute as symptoms associated with a crushing wrist injury.

Dr. Figari also commented upon the similarity between symptoms of a Median nerve injury and a C5-C6, C6-C7 nerve root impingement. Both injuries result in a tingling in the hand. Although any of Claimant's previous injuries could have caused this particular injury, Dr. Figari was not aware of any intervening event between October 1998 and July 1999. Finally, Dr. Figari testified that the eventual success of the July 2001 neck surgery could very well indicate that Claimant had a neck injury all along.

Dr. Thomas Mims, whose medical records are Employer's Exhibit 35 and deposition is Employer's Exhibit 1, is a board certified neurosurgeon, and had been Claimant's treating physician for several previous back injuries, dating back to 1989. In 1989 he had performed surgery on Claimant's herniated disc at L5-S1, and again in 1997 a laminectomy with disc removal and lumbar fusion at L5-S1. As late as January 1999, Dr. Mims had checked with Mr. Haley to insure that he was not over medicating himself with Vicodin.

On November 18, 1999 Mr. Haley returned to Dr. Mims with a "new" problem, referred by Dr. Figari at Claimant's request. Dr. Mims reported Claimant's pain as an aggravating pain and numbness that radiated from the left side of the neck over into the left trapezius muscle and then down into the back side of the left arm, and down into the hand area. Dr. Mims also remarked that the range of motion was limited to two-thirds the normal range in the left neck movement. Dr. Mims noted that there was slight tenderness in the side of the neck, absent bicep reflex on the left and absent tricep reflex on both sides. There was also decreased touch sensation in thumb and index finger of the left hand. He felt that the only way to resolve the injury was with surgery. However, before he proceeded Dr. Mims requested another MRI and EMG.

Dr. Mims testified in his deposition, that it seemed reasonable to feel that Claimant's delayed symptoms were compatible with the October 13, 1998 injury, and, in fact, may have been on-going, but not necessarily manifested, since the carpal tunnel and wrist surgery were so prominent. Just as Dr. Masson had explained, Dr. Mims commented that it is not uncommon to have a C5-C6 injury confused with a Median nerve/carpal tunnel problem. One may be able to tell the difference at times, but not always, especially if both injuries are actually present. He reiterated that both Drs. Figari and Masson initially focused on the wrist area, without investigating other sources of pain. Dr. Mims also explained that the

shooting arm pain that Claimant complained of ten days after the accident could be consistent with a C5-6, C6-7 herniated disc.

In February 2000, Claimant's final visit to Dr. Mims, the MRI confirmed the diagnosis of November 1999, Claimant had left paracentral disc extrusions at both C5-6 and C6-7, with secondary impingement on the anterior lateral aspect of the cervical cord. Dr. Mims also testified that throughout the ten years of treating Mr. Haley he never had concerns of credibility or symptom magnification.

Dr. Jack W. Pennington, an orthopedic surgeon whose medical records are Employer's Exhibit 7, was the next doctor to see Claimant, at Employer's request. He examined Claimant only once, on April 17, 2000. His main purpose was to determine whether Claimant's complaints of neck pain were related to the wrist injury. He found that, after reviewing the medical documentation, the injury was unrelated to the October 13, 1998 incident.

On May 10, 2000, Claimant was admitted to Southwest Texas Methodist Hospital for chest pain, headaches, numb arm, and pain breathing. The medical documents, Employer's Exhibit 3, indicate that Claimant was sitting when the pain came, and that deep breaths aggravated the pain. Dr. F. Wright Hartsell restricted Claimant from work. Claimant visited the hospital one month later, on June 14, 2000, for unrelated intestinal infection.

Dr. Frank Barnes, a general orthopedic surgeon, saw Claimant for an independent medical examination on October 23, 2000, at the request of the U.S. Department of Labor. His report is Employer's Exhibit 8 and his deposition is Employer's Exhibit 34. Dr. Barnes noted that the neck and shoulder complaints arose 5-6 months after the injury, and therefore were probably not related to the October 13, 1998 accident. There had been no orthopedic or neurological evaluation prior to July 1999. Dr. Barnes did not think that the neck injury was related to the October accident, however, upon further questioning he did admit that it was possible that the neck injury was overlooked in light of the wrist injury. He also confirmed what other doctors had mentioned, that the two injuries are difficult to distinguish because of similar symptoms. Dr. Barnes assigned the wrist a 4% impairment rating of the upper left extremity, finding July 21, 1999, as the date of Maximum Medical Improvement.

Dr. Clay Suggs, a chiropractor whose records are Claimant's Exhibit 38, saw Claimant on June 8, 2001 at the Spinal Care & Rehabilitation Center. He diagnosed Claimant with a left cervicobrachial syndrome associated with myositis, complicated by cervical disc degeneration, intervertebral disc displacement and hypolordosis. He then recommended that Claimant see Dr. Purswami. Claimant said that he had been doing well until a neck pain, similar to that experienced two years earlier, reappeared and worsened.

Dr. Shyam Purswami, a doctor with a specialty in pain management, was referred by Dr. Suggs. His medical records are Employer's Exhibit 9. Dr. Purswami first saw Claimant on June 14, 2001. He ordered an MRI. Four days later on June 18, 2001, after analyzing the tests, Dr. Purswami recommended that Claimant see a neurosurgeon or orthopedic surgeon. He referred Claimant to Dr. Hilton.

Dr. Donald Hilton is a board certified neurosurgeon in San Antonio, Texas. He first saw Claimant on June 26, 2001. Dr. Hilton's deposition is Employer's Exhibit 37, and his records are Employer's Exhibit 10. Claimant explained that he had been tolerating the mild to moderate pain until approximately May of 2001. Dr. Hilton felt that cervical surgery was necessary, and performed the two level fusion on July 3, 2001 at Southwest Texas Methodist Hospital. There were follow-up appointments on July 17, 2001 and August 27, 2001. On both visits, Dr. Hilton noted that Claimant was improving. Claimant's last visit was January 25, 2001, during which Dr. Hilton noted an excellent recovery.

In Dr. Hilton's deposition, EX 44, he opined that Claimant's neck reached Maximum Medical Improvement on January 3, 2002. There was no permanent impairment rating, however, Dr. Hilton did recommend that Claimant should neither spend all day with his neck strained looking upward, nor should he lift heavy objects. Dr. Hilton also agreed with the other physicians that persistent numbness, weakness and loss of grip and strength would be consistent with a C6-7 injury.

Claimant testified at the formal hearing that before the surgery he was having trouble holding things that were extremely hot or cold. The surgery enabled Claimant to grip things, which was an improvement. The pain that had radiated down his arm and shoulder was gone, and, although there remains some stiffness, there is no excruciating pain. Claimant also articulated that there is some residual

nerve damage in his fingers, due to the fact the nerves were compressed, but that after the surgery on July 3, 2001, much of the dexterity has returned to his hand.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon the Court's observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc.*, 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). It has been consistently held that the Act must be construed liberally in favor of Claimant. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a

decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this case, Claimant alleges that the harm to his wrist, as well as his cervical condition, resulted from working conditions at the Employer's shipyard. Employer has accepted that the wrist injury is causally connected, as stated in the stipulations, however, the main point of contention is Claimant's neck injury. Claimant argues that he had consistently alluded to arm and shoulder pain, and as there was no interim injury, the accident at TDI on October 13, 1998 caused or aggravated all of his injuries. Employer contends that the complaints of pain were too far removed in time from the original accident to be connected to the work place incident, and consequently they are not responsible for either compensation or medical treatment for that condition.

The medical evidence does support Claimant's claim that he did sustain a cervical injury. Drs. Masson, Figari and Hilton all diagnosed Claimant with a cervical condition. However, there is some dispute as to the employment conditions having caused that condition. The disagreement centers around whether it was physically possible for Claimant to have "dangled" from the man-lift basket after the upward surge. Regardless, there is testimony from several doctors that it is a fairly common response to a crushing injury to pull the wrist or hand from the pinned position, and in so doing strain the arm, shoulder, or back. According to the medical experts, whether Claimant actually dangled, as he testified, or whether he tried to pull his wrist away from where it was pinned, the surge of the man-lift combined with his pinned wrist, provided work place conditions sufficient to cause a herniated disc.

Therefore, I find that the accident which caused the wrist injury provided the same conditions that could have caused or aggravated the neck condition. In order to establish the prima facie case, there need not be any affirmative causal connection. Based on the evidence, Claimant has made a prima facie case sufficient to trigger the section 20(a) presumption. There was a harm suffered, Claimant did have a cervical inury, and the incident in the man-lift was sufficient to trigger such an injury, either by dangling or the yanking phenomenon of trying to retrieve the crushed wrist. In addition, Drs. Mims and Figari testified that it is conceivable that Claimant's cervical condition was caused or aggravated by the accident and went unnoticed because of the severity of the wrist injury and/or because the symptoms

were so similar. Thus, the presumption as to both Claimant's wrist and neck injuries has been invoked. The burden shifts to Employer to rebut the presumption.

Employer presented several doctors who opined that the neck injury was not related to the October 1998 accident. Drs. Barnes, Pennington and Masson all stated that due to the chronology of pain complaints they did not believe that the pain in the neck, that arose several months after the work site accident, was related. Dr. Masson stated, that after studying the physical manifestations of pain, as well as the history of treatment from the date of the accident, he felt that the injury was unrelated. Drs. Barnes and Pennington agreed. Also, neither Bill Hardy nor Rocky Lyons were aware or any further complaints related to the injury, nor did they feel that Mr. Haley had complained of neck pain shortly after the incident. Therefore, based on the evidence from both doctors and co-employees, I find Employer has rebutted the presumption of causation.

Since the presumption has been rebutted, I must weigh the evidence as a whole and determine whether there is a causal connection based on substantial evidence. The burden of persuasion rests upon Claimant; and I find, for the following reasons, that in spite of the delay in symptoms, the herniated discs were a result of the October 13, 1998 accident on the man-lift.

The doctors agreed that the symptoms of both injuries are similar, and that it is common for a misdiagnosis to occur, especially where both pathologies are present. Further, all doctors agreed that simultaneously occurring injuries manifest themselves at various points, especially if one is more obvious or serious than the other.

Dr. Mims expressed the opinion that the disc may have been injured at the time of the incident, and did not become symptomatic until the healed wrist allowed the Claimant to increase his activity. Dr. Figari appeared to agree, though he found it hard to determine; and Drs. Masson and Barnes both conceded either the symptoms could have confused the earlier diagnosis or that it was conceivable that Claimant's accident could have caused or aggravated his cervical condition.

Dr. Barnes and Dr. Pennington were not Claimant's treating physicians, and based their opinions primarily on the failure of the medical documentation to note Claimant's complaints of neck or back pain over the six months following his

accident.

Dr. Mims explained in his deposition that Claimant's delayed symptoms are still compatible with the October13, 1998 injury, and in fact may have been on-going during the intervening time, but not necessarily manifested since his carpal tunnel wrist surgery was so prominent (EX 18, p. 14). Dr. Mims, as well as Dr. Masson, also opined that the neck injury would have manifested as physical activity increased, namely the work hardening program. Dr. Mims explained that once a disc has been ruptured or herniated, then the nerve response can fluctuate. If one were to use the arm more, then it tugs on the nerve, which is already sensitive related to the pressure from the ruptured disc, and it hurts more. Dr. Masson theorized that a disc protrusion could be related to a traumatic event, like a withdrawal effect at the time of the October 13, 1998 incident which could just jolt the neck enough to cause a disc protrusion, and that many people with disc protrusions do not necessarily experience pain co-existent with the injury (EX 33 p 29-30).

Neither the Employer, nor the Claimant, can point to an intervening incident that would otherwise have caused the neck injury that resulted in fusion surgery. In other words, although there might have been a previous injury which was aggravated by the October 13, 1998 accident, there is no evidence of a subsequent injury to interrupt the causal connection.

Finally, Drs. Mims, Masson, and Hilton all agreed that the problem with Claimant's neck, has symptoms that are remarkably similar to a Median nerve/carpal tunnel problem. They all concurred that at times a doctor may be able to differentiate, but not always, especially if both problems are involved. Claimant's shooting arm pain that he complained of shortly after the accident, could be symptomatic of both problems, which originated the same day. Notably, the pain persisted or returned until the neck surgery, which is an indication that what had initially been attributed to the wrist, was actually resolved by neck surgery, suggesting that its source all along had been disk herniation.

In sum, there is substantial evidence to indicate that Claimant suffered a neck injury on October 13, 1998, whose symptoms did not manifest themselves until the wrist injury had reached maximum medical benefit. I find it more persuasive that Claimant was preoccupied with his wrist, and therefore failed to complain more

strenuously of the co-existent arm and shoulder pain, and when he did it was ascribed to his wrist as oppose to determining an independent source of pathology.

Nature and Extent

Having established a neck injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

Dr. Barnes assessed Claimant's wrist as resulting in a 4% impairment of the upper left extremity, as of July 21, 1999, the date of Maximum Medical Improvement for the wrist injury. There is no conflicting evidence regarding Claimant's wrist, and so I accept Dr. Barnes' recommendations.

Dr. Hilton, who performed Claimant's neck surgery, found that Claimant's neck had reached Maximum Medical Improvement as of January 3, 2002. Likewise, since there is no evidence to the contrary, I accept Dr. Hilton's determination. Therefore, both injuries are permanent.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative

employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

If an injury occurs to a body part specified in the statutory schedule, then the injured employee is limited to the permanent partial disability schedule of payment contained in Section 908 (c)(1) through (20). The rule that the scheduled benefits are exclusive in cases where the scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability was thoroughly discussed by the Supreme Court in *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 101 S. Ct. 509, 66 L. Ed. 446 (1980) (hereinafter "*PEPCO*"). However, a scheduled injury can give rise to permanent total disability pursuant to Section 908 (a) in an instance where the facts show that the injury prevents a claimant from engaging in the only employment for which he is qualified. *PEPCO*, 101 S. Ct. at 514 n. 17. Therefore, if Claimant establishes that based on the scheduled injury he is totally disabled, the schedule becomes irrelevant. *Dugger v. Jacksonville Shipyards*, 8 BRBS 552 (1978), *aff'd*, 587 F.2d 197 (5th Cir. 1979).

In this instance, Claimant lost no wages from the date of his accident on October 13, 1998, although he was essentially performing light duty work, until there was a general lay off on February 19, 1999, when Claimant lost his job. After the lay off, Dr. Figari took Claimant off work, and this restriction was confirmed by Dr. Masson on March 1, 1999. While denying that Claimant's neck condition is related to his accident, Employer concedes that from the lay-off until Claimant reached MMI for his wrist on July 21, 1999 he is owed total temporary disability compensation. After that date, however, Employer maintains it owes only a payment of Claimant's scheduled injury to his wrist (TR 27). Consequently, the issues for me to decide are: 1) what if any compensation is Claimant owed for his neck condition, for which he reached MMI on January 3, 2002; 2) if Claimant is

owed additional compensation for his neck, when should the scheduled wrist injury be paid; and 3) is Claimant's wrist, for schedule purposes a hand or arm injury.

Concerning the later, the parties agreed that Claimant has a 4% permanent impairment to his wrist; and I find, through Dr. Barnes' testimony, that Claimant's 4% impairment is of the upper left extremity. Wrist injuries may be considered as scheduled permanent partial disabilities to the arm under Section 8(c)(1) rather than as a disability to the hand under Section 8(c)(3). *See Sankey v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 886 (1978); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). As the board observed in *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413, 416 (1989), "where an injury to the lesser member also affects the greater, the Act provides for compensation equal to the amount which could be received for loss of use of the greater member alone." *See* Section 8 (c)(17); *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985). The Board has held that a claimant is eligible for an award under Section 8 (c)(1), which provides compensation for loss of use of the arm, where the injury occurred below the elbow." *Id.*; *See generally Stokes v. George Hyman Construction Co.*, 19 BRBS 110 (1986). Total loss of the upper extremity is scheduled as 312 weeks. 8(c)(1). Therefore a 4% impairment would equal to 12.48 weeks of benefits, based on the stipulated average weekly wage of $662.05.

As to when Claimant's schedule injury should be paid, employer argues that, under the mandate of *PEPCO*, Claimant can not receive both the temporary total benefits for his neck injury as well as receiving his scheduled wrist payment. The schedule must be paid out when the injury becomes permanent, citing *PEPCO* for the proposition that scheduled injuries take precedence over unscheduled injuries. *PEPCO* at 274. Claimant, on the other hand, argues that total temporary disability benefits should be paid from February 19, 1999 until January 3, 2002, after which time the scheduled wrist injury should begin. In essence, Claimant asks for the awards to be "stacked" and Employer argues that *PEPCO* does not permit stacked awards.

If I were to adopt the Employer's position, awarding the schedule before the temporary benefits can begin, then Claimant would be deprived of his entitlement to the temporary benefits for his neck which were accruing during the same time period. In other words, it would ignore the neck injury, and the accompanying benefits, until the wrist injury was paid. That same argument was rejected by the

Fourth Circuit in *ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139 (CRT) (4th Cir 1999), and again by the BRBS in *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). On the other hand, a total disability award and a scheduled award can not be paid concurrently because a claimant can not be more than totally disabled, therefore the maximum benefit a claimant can receive is two-thirds of the average weekly wage. 33 U.S.C. § 908(a); *Hastings v. Earth Satellite Corp*., 628 F.2d 273 (9th Cir 1956); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985); *Rathe v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 77 (1981).

Under *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT) (9th Cir 1995) administrative law judges are instructed to make "whatever adjustments" are necessary to prevent overpayment. *Id* at 422. Although Employer argues that "stacked" awards are not permitted, I disagree. The only way to insure that Claimant is fully compensated for both his neck and wrist injuries is to pay the unscheduled benefits at the full partial compensation rate and pay the scheduled benefits in an amount equivalent to the difference between the maximum rate of compensation allowable under Section 6(b) of the Act and the unscheduled benefits, as the ALJ did in *Padilla*. In other words, beginning September 13, 1999, Claimant will receive his temporary partial disability benefit award, as well as a portion of his scheduled award, the combination of which cannot exceed $441.37[6], the maximum allowed by Section 6(b) of the Act. This concurrent payment would continue, for approximately 30 weeks, until the scheduled award has been paid in an amount equivalent to 12.48 weeks.

Lastly, I will address the matter of what compensation Claimant is entitled to receive for his neck, following his MMI date for the wrist injury. The Employer/Carrier has put forth that, since January of 2001, Claimant has been employed as a deputy sheriff for the Bandera County Sheriff's Department, and his earnings in 2001 were $17,606.00 which means that the average weekly wage was $338.57 per week.[7] Claimant contends that he was totally disabled from the lay off in February 1999 through MMI for his neck in January 3, 2002 and therefore entitled to total temporary disability during that time, or in the alternative that Claimant's disability was partial because of a loss of wage earning capacity during

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[6]Two-thirds of his stipulated average weekly wage of $662.05

[7] $17,606.00 ÷ 52 weeks = $338.57

that time, with a earning capacity was $243.73 per week, based on the total yearly earnings for 1999, 2000, and 2001, $36, 315.81 divided by the total number of weeks 149.

Although Claimant had reached MMI for his wrist by July 21, 1999, he says his neck had begun to manifest symptoms and become disabling. There is some disagreement as to exactly when Claimant's neck injury was first manifested. Claimant complained of arm and shoulder pain that was recorded by a doctor, as early as ten days following the accident. However, the first *treated* symptoms were in July 1999, when the pain and injury became so severe. Claimant testified that his neck injury became excruciatingly painful when he was taken to the hospital with alleged cardiac problems on July 7, 1999. Claimant was determined to have no cardiac problems, however, when he saw Dr. Masson, complaining of neck and arm pain, Dr. Masson felt that the work hardening might have unmasked some irritation at the level of the neck. On July 21,1999, although Dr. Masson felt that the wrist injury was at MMI, he restricted Claimant from work until the neck pathology could be cleared up.

Dr. Figari continued to restrict Claimant's ability to return to work on August 2, 1999. The medical records from that day contain the notation "No Work" next to the area which designate return-to-work restrictions.(CX 40 p. 20) Essentially, Claimant remained totally disabled, although his neck injury would be the source of the *continuing* total disability. Mr. Haley was never given a release to work following Drs. Masson and Figari's diagnosis of his neck injury, therefore he has established a prima facie case of a continuing total disability. Despite this fact, however, Mr. Haley did find employment on September 13, 1999 at Braundera Yard & Hardware as a truck driver.

When the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). Therefore, on the date of his hiring, Claimant's disability is partial not total, and his lost earning potential must be evaluated. After working for Braundera, Claimant took several other jobs, including his job at Alamo and Wackenhut Airline Security. His total earnings during those times were $19, 341.81 from the 70 weeks between September 13, 1999 and January 14, 2001; and because the record in this case did not establish the exact dates of Claimant's employment, I have assumed that Claimant continued to work, going from one job

to the next without interruption, never returning to total disability. His average weekly wage was $276.31.[8]

Finally, Mr. Haley testified that he was employed by Bandera County Sheriff's Office on January 21, 2001. Claimant explained that he is capable of performing that job, and consequently, I find that it is also suitable alternative employment. A fact with which Employer's own vocational rehabilitation expert, Mr. Quintanilla, agreed.

The parties have agreed that in 2001, Claimant earned $17, 606.00. Therefore the average weekly wage for 2001 would be $359.30.[9] Mindful, however, of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, 23 BRBS 330 (1990), Claimant's wages are adjusted to reflect their value at the time of Claimant's May 1998 injury. The National Average Weekly Wage (NAWW) for October 1998 was $435.88, and the NAWW for January 2001 was $466.91. Thus, the 1998 NAWW was approximately 93 % of the 2001 NAWW. Therefore, the wages must be adjusted accordingly. Based on these adjustments, I find that Claimant has a residual wage earning capacity of $334.15 per week beginning January 21, 2001, the date of hire at Sheriff's Office.[10]

Turning next to the year 2002, based on Claimant's current position, his average weekly wage in 2002, since reaching MMI is $431.47.[11] Again, however, mindful of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, 23 BRBS 330 (1990), Claimant's wages are adjusted to reflect their value at the time of Claimant's May 1998 injury. The National Average Weekly Wage (NAWW) for October 1998 was $435.88, and the NAWW for January 2002 was $483.04. Thus, the 1998 NAWW was approximately 90 % of the 2002 NAWW. Therefore, the wages must be adjusted accordingly. Based on these adjustments, I find that Claimant has a residual wage earning capacity of $388.32 per week

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[8] $19, 341.81 ÷ 70 = 276.31

[9] $17,606.00 ÷ 49 weeks = $ 359.30 per week, Claimant did not begin working as a deputy until January 21, therefore his earnings should be divided by 49 not 52.

[10] Claimant argues that the past three years of earning should be added together and divided by 149 weeks, however, that does not logically follow in attempting to determine the lost earning capacity *for the year 2001*.

[11] $8,313.73 ÷ 19.28 weeks = $431.47 per week

beginning January 3, 2002, date of MMI for Claimant's neck injury.

In conclusion, I find that Claimant was temporarily totally disabled from February 19, 1999, following the general lay off until his wrist reached MMI on July 21, 1999. Thereafter, Claimant continued to be owed temporary total disability benefits for the injury to his neck until September 13, 1999 when he found employment. Thereafter, from September 13, 1999 until January 3, 2002 Claimant is owed temporary partial disability benefits for the lost wage earning capacity as previously outlined. From January 3, 2002 and continuing Claimant is owed permanent partial disability for his lost wage earning capacity. Also as earlier outlined Claimant is entitled to scheduled benefits for his permanent wrist injury.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.,* 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'd* 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curium) *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen v.*

Horne Bros., Inc., 16 BRBS 10 (1983).

Claimant seeks reimbursement for the physical therapy and work hardening session prescribed by Dr. Masson. Dr. Masson felt that the physical therapy was necessary to further benefit Claimant's wrist. Therefore it was recommended by an authorized physician, and was reasonable and necessary to treat Claimant's wrist injury. Therefore, Employer is responsible for these expenses.

Claimant also seeks reimbursement for the July 7, 1999 hospital visit. Claimant's pain on his left side was so intense that he thought he was experiencing a heart attack. Dr. Mason testified in his deposition, he believed that the pain that Claimant had guessed was cardiac, was in fact related to a neck or back injury, and consequently ordered and MRI. Dr. Masson also proposed the idea that Claimant had been off of work due to the injury, and was experiencing stress both from the injury and being unemployed. Whether it was conclusively either stress induced due to the wrist injury or a result of the cervical radiculopathy of C6-7 is of no moment. Either way, it was a result of Claimant's injuries of October 13, 1998, and therefore both reasonable and necessary. Consequently, I find that it was reasonable in light of the severe pain to have called an ambulance and been taken to the hospital and receive treatment. Due to the emergent nature of this particular treatment, although it had not been authorized, it was the unavoidable result of the workplace injury, and therefore, is covered.

Section 8(f) Relief

Section 8(f) of the Act provides that an employer may limit its liability for compensation payments of permanent disability if the following elements are present: (1) the claimant has a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the disability which exists after the work-related injury is not due solely to the injury, but is a combination of both that injury and the existing permanent partial disability. *Two "R" Drilling Co., Inc. v. Director, OWCP,* 894 F.2d 748, 750 (5th Cir 1990).

The purpose of Section 8(f) is to prevent employer discrimination in the hiring of handicapped workers, and to encourage the retention of handicapped workers. *Lawson v. Suwanee Fruit and Steamship Co.*, 336 U.S. 198 (1949); *Director, OWCP v. Campbell Indus., Inc.*, 678 F.2d 836, 839 (9th Cir. 1982). It is also well

settled that the provisions of Section 8(f) are to be construed liberally in favor of the employer. *Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192 (5th Cir. 1977); *Johnson v. Bender Ship Repair, Inc.*, 8 BRBS 635 (1978).

In this instance, the Director never addressed the merits of this issue, but rather raised the "absolute defense" of section 908(f)(3), claiming that the request for Special Fund relief was not filed with the district director before the case was referred to the Office of Administrative Law Judges. It is undisputed that Employer did not file a request prior to the date the case was referred to the OALJ, and further that an informal conference was never held.

Section 8(f)(3) states that any request for Section 8(f) relief shall be presented to the district director prior to the consideration of the claim by the district director and that failure to do so be an absolute defense to the liability of the Special Fund. The regulations provide that this must be affirmatively raised and pleaded by the Director. 20 C.F.R. § 702.321 (b)(3).

Employer argues that since the request was filed shortly after the Claimant's neck injury reached MMI, as well as the mitigating factor of the Carrier declaring bankruptcy which resulted in chaos for a period of nine months, it should preclude the Director's absolute defense. The solicitor, however, argues that the issue of limited liability was raised well after the Claimant had reached MMI and it should have known of the permanency of Claimant's neck injury as an issue.

Under 20 C.F.R. 702.321 (b), an employer must request section 8(f) relief "as soon as the permanency of Claimant's condition becomes known." The regulations detail the requirements for a "fully documented application" for section 8(f) relief. 20 C.F.R. 702.321 (a). The regulations also require that an employer's "failure to submit a fully documented application by the date established by the district director shall give an absolute defense to the liability of the special fund." 20 C.F.R. 702.321 (b)(3). They too provide that an employer can "for good cause, request an extension of time to submit its fully documented application." 20 C.F.R. 702.321 (b)(2). 20 C.F.R. 702.321(b)(3) further provides, that if the Employer could not reasonably anticipate the liability of the special fund then the early application is excused; however, that does not apply simply if the employer is contesting its own liability. *see also Huntley v. Marine Terminal Corporation*, 29 BRBS 822, 823 (1995).

There is some degree of confusion concerning the Claimant's injuries. The wrist injury reached MMI in July 1999, however, the neck injury, upon which 8(f) relief is sought, did not reach MMI until January 3, 2002. They are considered two separate injuries, both arising on October, 13, 1998. However, the neck injury, or herniated discs, was not manifested until after the wrist injury had been fully treated. At the time the case was referred to the Office of Administrative Law Judges, the neck injury, which forms the basis for the 8(f) application, had not reached MMI.

Therefore, the applicable language of the regulations, 20 C.F.R. § 702.321(b)(3),

> "Where the claimant's condition has not reached maximum medical improvement and no claim of permanency is raised by the date the case is referred to the OALJ, an application need not be submitted to the district director to preserve the employer's right to later seek relief under section 8(f) of the Act."

means that Employer's application for relief was timely filed and is not barred.

Merits of the 8(f) claim

I. A pre-existing permanent partial disability can be (1) a scheduled loss under Section 8(c) of the Act; (2) an economic disability arising out of a physical infirmity; or (3) a serious physical disability which would motivate a cautious employer to dismiss a claimant because of a greatly increased risk of an employment-related accident and compensation liability. *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977); *Cononetz v. Pacific Fisherman, Inc.*, 11 BRBS 175 (1979); *Johnson v. Brady-Hamilton Stevedoring Co.*, 11 BRBS 427 (1979). Although the mere fact of any past injury does not establish a disability, the existence of a serious and lasting disability does. *Foundation Constructors v. Director, OWCP*, 950 F.2d 621 (9th Cir. 1991).

The evidence is undisputed that prior to his October 1998 injury, Claimant suffered permanent partial disabilities to his back which would have given a reasonable employer pause prior to hiring Claimant. Claimant's chronic conditions of his back created a greatly increased risk of an employment-related accident and compensation liability for Employer. Specifically, Dr. Mims testified that he had

performed both a lumbar fusion as well as a disk laminectomy prior to Claimant's October 13, 1998 injury. Claimant was also assessed with an 18% whole body impairment as of September 1997 by Dr. Haig (EX 35 exhibit 7).

II. The second requirement for Section 8(f) relief is that the pre-existing work-related injury is manifest to the employer prior to the employment injury. This determination is made after an objective inquiry, and so a pre-existing impairment is manifest if the employer knew or could have discovered the impairment prior to the second injury. The existence or availability of record showing the impairment is sufficient notice to meet the manifest requirement, although the actual injury might have been unknown to the employer. *Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 392 (5th Cir 1997) *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 80-83 (1st Cir. 1992); *Eymard & Sons Shipyard v. Smith*, 862 F2d 1220, 1223 (5th Cir. 1989). Further, virtually any objective evidence of the pre-existing permanent partial disability, even evidence which does not indicate the permanence or severity of the disability, will satisfy the manifest requirement, since it could alert the employer to the existence of a permanent partial disability. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990); *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir.1986); *Lowry v. Willamette Iron and Steel Co.*, 11 BRBS 372 (1979).

Ample medical records existed regarding Claimant's back condition prior to his 1998 work-injury which satisfy the manifestation element under the Act. On June 30, 1989 Dr. Mims performed a laminectomy with foraminotomy, exploration and excision of a herniated disc, due to a fall from a maintenance buggy at work. Then Claimant returned to Dr. Mims in March 1997, because he had injured himself by slipping from a truck and hitting his back on February 17, 1997. Dr. Mims treated Mr. Haley, and eventually referred Claimant to Dr. Christenson who performed a repeat laminectomy and decompression at L5-S1 with interbody fusions at L5-S1. Claimant continued to heal from that surgery, with intermittent difficulties including a visit to the Emergency Room . By August 1998, Claimant had reached maximum medical improvement, with an 18% permanent impairment assessed by Dr. Martin Haig, and a restriction that included only light duty, no heavy work.

Consequently, I find Claimant's prior back injuries were manifest to Employer, satisfying the second requirement for Section 8(f) relief.

III. Lastly, an employer may obtain Section 8(f) relief where the combination of the worker's pre-existing disability or medical condition and his last employment-related injury result in a greater permanent disability than the worker would have incurred from the last injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991); *Director, OWCP v. Newport News and Shipbuilding and Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982); *Comparsi v. Matson Terminals, Inc.*, 16 BRBS 429 (1984).

The key element is whether the work-related injury, when coupled with the prior disability, materially and substantially aggravated and contributed to the employee's permanent disability. *Dunkin v. Newport News Shipbuilding and Dry Dock Co.*, 15 BRBS 182, 183 (1982). *See also Hedges v. J. M. Martinac Shipbuilding Corp.*, 16 BRBS 474 (1984). Under this third requirement for Section 8(f) relief, it must be determined , by substantial evidence, if a claimant's present disability results from a coalescence or combination of the most recent work-related injury and the prior permanent impairment of record. *Furney v. Ingalls Shipbuilding Division, Litton Indus. Inc.*, 17 BRBS 99 (1984)*; Duncanson-Harrelson & Co. v. Director, OWCP*, 13 BRBS 308, 313(1981).

Dr. Hilton testified that Claimant's pre-existing back surgeries and injuries combined with the newest injury to place Claimant in a position to have more limitations than one who had just had one back surgery. Dr. Hilton also testified that Claimant is at risk for additional problems in his neck and back, more so than a person who has not had surgical intervention.(EX 37, p 11-15) He agreed that Claimant should be more careful and has more limitations put on him because he has had surgery at two levels. The risk of additional problems is evidence of a coalescence of the prior injuries and the most recent injury making Claimant more disabled than he would have otherwise been.

Dr. Mims opined that Claimant may have had bone spurs related to one of the other injuries, but was able to tolerate them. However, when there was a subsequent injury, October 1998, the nerve was pinched even more, it was irritated and would not go away until a neck operation relieved the pressure from the nerve (EX 35 p 48). Dr. Mims agreed with Dr. Haig that based on the laminectomy and L5-S1 cage fusion performed in September 1997, Claimant had an 18% whole body impairment before his October 13, 1998 injury. (EX 35 , exhibit 7)

Based on the MRI from July 29, 1999, Dr. Masson explained that Claimant suffered from a spinal stenosis that could have been caused by a history of prior injuries, which is non-focal on the MRI, and would hasten the degenerative process of spinal stenosis. Claimant does have a history of spinal injuries, namely to the lumbar spine. Dr. Masson explained further that spinal stenosis is a pre-disposing anatomic decrease in the size of the canal so that if there were a mild herniation of any sort, it would put the individual at a higher risk than someone who does not have a pre-existing stenosis, such that the protrusion, which may not otherwise be a significant herniation, will then cause symptoms (EX33 p 27).

In order to find that the pre-existing injury combined with the existing injury materially and substantially aggravated and contributed to the employee's permanent disability, there must be substantial evidence. There is evidence from Dr. Hilton that Claimant's prior surgeries worsened his present condition. Although there was no specific testimony that Claimant's permanent impairment to the whole body increased as a result of the October 13, 1998 injury, the possibility of it exacerbating Claimant's condition was presented by Drs. Masson and Mims. Also, coupled with Claimant's increased vulnerability due to his most recent injury is the fact that he cannot return to his pre-accident employment. Therefore, I find Claimant's existing permanent partial disability, loss of wage earning capacity, is due to the combination of the laminectomy and lumbar fusion combined with the cervical surgery performed in July 2001.

Thus, having met each of the requirements, Employer is afforded Section 908(f) relief.

Section 14 (e) penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation following the injury, as well as filed a Notice of Controversion on March 22, 1999. However, Employer paid compensation benefits until December 2000. Therefore, as Employer paid compensation within 14 days of learning of injury, no §14 (e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from February 19, 1999 until September 13, 1999;

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits, for Claimant's neck injury, from September 13, 1999 through January 21, 2001 based on the difference between the average weekly wage of $662.05 and his wage earning capacity of $276.31; and additionally during this period, commencing September 13, 1999 Employer/Carrier shall also pay to Claimant permanent partial disability compensation based on an average weekly wage of $662.05, for his 4% scheduled impairment of his left upper extremity, subject, of course, to the maximum rate of compensation allowable under Section 6(b) of the Act;

(3) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits for loss of wage earning capacity, from January 21, 2001 until January 3, 2002, based on the difference between the average weekly wage of $662.05 and adjusted residual wage earning capacity of $334.15;

(4) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits for loss of wage earning capacity, from January 3, 2002 and continuing, based on the difference between the average weekly wage of $662.05 and adjusted residual wage earning capacity of $388.32, provided, however, that after 104 weeks the Special Fund shall become liable as provided by §8(f) of the Act;

(6) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses resulting from Claimant's injuries of October 13, 1998, including the physical therapy and work hardening prescribed by Dr. Masson as well as the emergency visit to St. Elizabeth's Hospital on July 7, 1999;

(7) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(8) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

(9) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(10) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:eam